

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE GADSDEN COMPANY, LLC,  
AN ARIZONA LIMITED LIABILITY COMPANY,  
*Plaintiff/Appellant,*

*v.*

GORMAN & COMPANY, INC.,  
A WISCONSIN CORPORATION,  
*Defendant/Appellee.*

No. 2 CA-CV 2021-0118  
Filed July 27, 2022

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THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
NOT FOR PUBLICATION  
*See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).*

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Appeal from the Superior Court in Pima County  
No. C20193251  
The Honorable Jeffrey T. Bergin, Judge

**VACATED AND REMANDED**

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COUNSEL

Mesch Clark Rothschild, Tucson  
By Isaac D. Rothschild, Bernardo M. Velasco, and Jana L. Sutton  
*Counsel for Plaintiff/Appellant*

Osborn Maledon P.A., Phoenix  
By Geoffrey M.T. Sturr and Matthew J. Stanford  
*Counsel for Defendant/Appellee*

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MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court in which Presiding Judge Eckerstrom and Judge Espinosa concurred.

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V Á S Q U E Z, Chief Judge:

¶1 The Gadsden Company LLC appeals from the trial court’s grant of summary judgment in favor of Gorman & Company Inc. on Gadsden’s breach of contract and covenant of good faith and fair dealing claims.<sup>1</sup> On appeal, Gadsden argues Gorman was not entitled to summary judgment because the court misinterpreted the contract at issue. We agree and, for the following reasons, vacate and remand for further proceedings.

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<sup>1</sup>Gadsden also challenges the trial court’s denial of its motion for partial summary judgment on its breach of contract claim. Generally, an appeal lies only from a final judgment. A.R.S. § 12-2101(A)(1). The denial of a motion for summary judgment is not an appealable order, *Navajo Freight Lines, Inc. v. Liberty Mut. Ins. Co.*, 12 Ariz. App. 424, 427 (1970), because such an order is an intermediate order deciding simply that the case should proceed to trial, *Sorensen v. Farmers Ins. Co.*, 191 Ariz. 464, 465-66 (App. 1997). “But if the denial was grounded on a purely legal issue that affected the final judgment, we can review it like any other interim order.” *Ryan v. Napier*, 245 Ariz. 54, ¶ 14 (2018). We decline to do so in this case for two reasons. First, Gadsden has not argued that the issues relating to its motion for summary judgment involve purely legal issues. “Whether contract language is reasonably susceptible to more than one interpretation so that extrinsic evidence is admissible is a question of law for the court,’ but the intent of the parties is a question of fact left to the fact finder.” *Chopin v. Chopin*, 224 Ariz. 425, ¶ 7 (App. 2010) (quoting *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 158-59 (1993)). We therefore will not consider the court’s denial in this appeal. Second, Gadsden has not requested that we accept special-action review of the court’s ruling on its motion, and, even had it done so, “we normally disfavor accepting special action jurisdiction to review the denial of a motion for summary judgment.” *Tucson Unified Sch. Dist. v. Borek*, 234 Ariz. 364, ¶ 5 (App. 2014).

### Factual and Procedural Background

¶2 We view the facts and all reasonable inferences in the light most favorable to the party opposing summary judgment. *Windhurst v. Ariz. Dep't of Corr.*, 252 Ariz. 240, ¶ 2 (App. 2021). In 2015, Gadsden and Gorman began discussions over the development of low-income housing on a property owned by Gadsden (“West End Station”). In 2016, Gorman successfully applied for a Low-Income Housing Tax Credit allocation for the West End Station. In December 2016, Gorman secured an investor, who conditionally agreed to provide funding for the West End Station project and to pay a development fee in exchange for 99.99 percent ownership.

¶3 On June 28, 2017, Gorman and the investor entered into a First Amended and Restated Operating Agreement of West End Station, LLC (“Operating Agreement”). The Operating Agreement designated Gorman<sup>2</sup> as the managing member of the West End Station project and required Gorman to obtain construction financing and manage construction operations. The Operating Agreement also required the investor to pay Gorman a development fee of \$1,879,252, or higher “as may be permitted by the Credit Agency” in accordance with the agreement’s pay schedule. The pay schedule listed \$598,034 of the total development fee as a “Deferred Development Fee,” while the remaining \$1,281,218 was divided into installments payable as follows: \$384,365 on the investor’s admission to the project; \$512,487 on the date of project completion; \$320,305 on the date of conversion to permanent financing; and \$64,061 on the completion of IRS Form 8609. If there was a budget shortfall for the project, the Operating Agreement required Gorman to cover the additional costs as “Development Advances” or “defer up to fifty percent (50%) of the Development Fee” with the deferred amount designated as an “Additional Deferred Development Fee.”

¶4 On June 30, 2017, Gorman and Gadsden entered into an Agreement Regarding Development (“the Contract”) obligating Gadsden to provide development services on the project. Under the Contract, Gadsden would be reimbursed for predevelopment costs up to \$95,000 and would receive a \$375,000 master development fee. Additionally, § 10 of the

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<sup>2</sup>Although the Operating Agreement named GEC WES, LLC as the managing member, Gorman’s president stated in a deposition that Gorman owned and managed GEC WES. Section 2 of the Contract between Gorman and Gadsden also states that an “[a]ffiliate of Gorman shall be the sole managing member” of the West End Station project.

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Contract entitled Gadsden to a share of Gorman's development fee and stated in relevant part:

Gorman shall subsequently enter into this Agreement Regarding Development with Gadsden pursuant to which Gadsden shall provide development services to Gorman. Gorman shall be entitled to the first sixty percent (60%) of the total allowable Development Fee as reflected in Exhibit A ("Development Fee"), whether deferred or not deferred, payable under the Development Agreement. Gadsden shall be entitled to the remaining cash paid (non-deferred) portion of the Development Fee, up to 40% of the total allowable Development Fee.

¶5 On the same date the Contract between Gorman and Gadsden was signed, the investor was admitted to the West End Station project, Gadsden received the \$375,000 master development fee, an affiliate of Gadsden was paid \$1,750,000 for the sale of West End Station, and Gorman received its first scheduled payment of \$384,365 from the development fee. Gadsden was also later reimbursed for its predevelopment costs out of the first construction draw.

¶6 In November 2018, Gorman notified Gadsden via email that its general contractor had exceeded its budget and that it would likely not qualify for the next development fee installment until the first quarter of 2019. In January 2019, Gadsden emailed Gorman a letter requesting assurances that construction would be completed in February 2019, that "no portion of the Developer Fee will be deferred," and that Gadsden would ultimately receive a total share of \$752,290.80 from the development fee. Gorman responded in a March 2019 email, stating Gadsden's maximum share was actually \$751,700.80 and the next development fee installment of \$512,487 would be applied to Gorman's sixty-percent share. When the \$512,487 became available to Gorman that month, it deferred the entire amount.

¶7 In April 2019, Gadsden sent a demand letter to Gorman, claiming Gorman overdrew its sixty-percent share of the development fee

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by \$63,442.61<sup>3</sup> and demanding all future development fee payments go to Gadsden. Gadsden then sued Gorman in July 2019, alleging breach of contract for Gorman's failure to pay Gadsden its share of the development fee. In January and February 2020, Gorman received two additional development fee payments of \$139,414.64 and \$100,000. In August 2020, Gadsden amended its complaint to include a claim that Gorman had breached the covenant of good faith and fair dealing. Gorman then projected that it would receive a \$447,630.85 payment when the IRS Form 8609s were issued and that its total amount of the development fee paid would be \$1,071,410.49.

¶8 Gorman moved for summary judgment on both of Gadsden's claims, and Gadsden moved for partial summary judgment on its breach of contract claim. The trial court denied Gadsden's motion and granted Gorman's. Additionally, the court granted Gorman attorney fees and costs under A.R.S. § 12-341.01. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1).

**Summary Judgment**

¶9 We review a trial court's grant of summary judgment de novo and will affirm "when 'there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law.'" *Kalway v. Calabria Ranch HOA, LLC*, 252 Ariz. 532, ¶ 9 (2022) (quoting Ariz. R. Civ. P. 56(a)).

***Breach of Contract Claim***

¶10 Gadsden argues the trial court erred by granting Gorman's motion for summary judgment on Gadsden's breach of contract claim because its decision was based on an erroneous interpretation of the Contract. Gadsden contends the court "disregarded the Contract's plain

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<sup>3</sup>In arriving at this number, Gadsden calculated Gorman's total share of the development fee to be \$1,127,551.20, which is sixty percent of \$1,879,252, the total development fee. Gadsden arrived at the \$63,442.61 amount from the total amount Gorman had actually received or deferred, \$1,190,993.81, including \$598,034 it had initially deferred, \$384,365 that had already been paid, and \$208,594.81 that Gorman projected would have to be deferred in its March 2019 email. At the time Gadsden sent the demand letter, it was not apparent Gorman had also already deferred the second installment of \$512,487.

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text to find two implied conditions precedent.” Gadsden further maintains the court’s interpretation nullifies the “whether deferred or not deferred” clause and rewrites the Contract.

¶11 We review a trial court’s interpretation of a contract de novo. *Town of Florence v. Florence Copper Inc.*, 251 Ariz. 464, ¶ 20 (App. 2021). When interpreting a contract’s language, the court’s “purpose is to determine and enforce the parties’ intent,” *Heaphy v. Willow Canyon Healthcare, Inc.*, 251 Ariz. 358, ¶ 8 (App. 2021), by interpreting “that language according to its ‘plain and ordinary meaning,’” *Apollo Educ. Grp., Inc. v. Nat’l Union Fire Ins. Co.*, 250 Ariz. 408, ¶ 11 (2021) (quoting *Teufel v. Am. Fam. Mut. Ins. Co.*, 244 Ariz. 383, ¶ 10 (2018)). Courts also “consider a provision’s meaning in the context of the entire contract,” while attempting “to reconcile and give effect to all terms of the contract to avoid any term being rendered superfluous.” *Terrell v. Torres*, 248 Ariz. 47, ¶ 14 (2020). If the contract’s “language is clear and unambiguous,” courts will apply the contract as written. *Estate of Decamacho ex rel. Guthrie v. La Solana Care & Rehab, Inc.*, 234 Ariz. 18, ¶ 17 (App. 2014).

¶12 In interpreting the Contract, the trial court found two conditions that needed to be satisfied before Gadsden could receive its portion of the development fee: first, “Gorman must receive the ‘first’ 60% of the total Development fee whether deferred or non-deferred,” and, second, “there must be some ‘remaining’ portion of the ‘cash paid, non-deferred’ portion of the Development Fee available to distribute to Gadsden.” Gadsden maintains conditions precedent are disfavored in Arizona. And it contends the court’s finding of implied conditions precedent disregards the Contract’s plain text and is based on an interpretation of the terms “entitled,” “earn,” “first,” and “remaining” that is inconsistent with their plain meaning. It also argues the court’s interpretation required it “to nullify the ‘whether deferred or not deferred’ clause and rewrite the Contract.”

¶13 “As a general rule, a contractual provision shall not be construed as a condition precedent unless the language of the provision plainly and unambiguously requires that construction.” *Valley Nat’l Bank of Ariz. v. Cotton Growers Hail Ins., Inc.*, 155 Ariz. 526, 528 (App. 1987). While “magic words” are not required for a condition precedent, “there must be contractual language demonstrating the parties’ unequivocal intent” to create the condition. *L. Harvey Concrete, Inc. v. Agro Constr. & Supply Co.*, 189 Ariz. 178, 182 (App. 1997).

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¶14 In relevant part, § 10 of the Contract first states “Gorman shall be entitled to the first sixty percent (60%) of the total allowable Development Fee as reflected in Exhibit A (‘Development Fee’), whether deferred or not deferred, payable under the Development Agreement.” While Gadsden and Gorman do not dispute the meaning of “entitled,” they disagree as to its effect on Gorman’s share of the development fee. Gadsden argues the trial court and Gorman erred in interpreting “entitled” to mean Gorman was “entitled to receive in cash” its first sixty percent of the development fee before Gadsden received its share. Gorman contends it never argued this interpretation and claims “entitled” merely “necessitates Gorman’s prior receipt of its share.”

¶15 The plain meaning of “entitled” is “[t]o furnish with a right or claim to something.” *Entitle*, The American Heritage Dictionary (5th ed. 2022 update). “Receive” means “[t]o take or acquire” or to “get or be given.” The American Heritage Dictionary (5th ed. 2022 updated). Therefore, having a right or claim to payment is not synonymous with actually receiving that payment. For example, this court’s decision may *entitle* a party to attorney fees but that party does not *receive* the attorney fees unless they comply with the provisions of Rule 21(b), Ariz. R. Civ. App. P., and then actually collect the fees from the opposing party. Thus, when the trial court interpreted “entitled” to be synonymous with “receive” in its finding of the first condition precedent, it improperly rewrote § 10 of the Contract, requiring Gorman to actually receive its portion of the development fee before Gadsden could receive its share. *See Fleming v. Tanner*, 248 Ariz. 63, ¶ 16 (App. 2019) (courts not authorized to rewrite parties’ agreements). Instead, the use of “entitled” here makes clear that the parties’ intent was for Gorman to have the right or claim to the first sixty percent of the development fee, an interpretation further supported by the Contract’s “whether deferred or not deferred” clause.

¶16 With respect to the “whether deferred or not deferred” clause, Gadsden argues the trial court’s interpretation of § 10 would render this “clause meaningless because [the court’s reasoning] does not count deferred sums against Gorman’s entitlement, which the clause unequivocally requires.” Gorman contends the clause “does not require deferred sums to be credited against” its sixty-percent share as that “would have rendered the phrase ‘meaningless.’” Instead, Gorman claims the clause clarifies that the “total allowable Development Fee” is the sum of the

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deferred and non-deferred portions.<sup>4</sup> However, Gorman's interpretation would require the Contract to be rewritten, as § 10 plainly states that Gorman is entitled to the first sixty percent of the total allowable development fee, not the first sixty percent of the total allowable non-deferred portion of the development fee.

¶17 Gadsden also contends that the trial court misinterpreted "first" as an adverb describing entitled rather than an adjective describing Gorman's sixty percent. Gorman maintains that "§ 10 grants Gorman a legal right 'before all others' to 60% of the total allowable Development Fee" and that it gets \$1,127,551.20 "before Gadsden gets anything." Gorman is correct on this point, but as the above discussion on the meaning of "entitled" and the "whether deferred or not deferred" clause demonstrate, its first sixty-percent entitlement is not limited to cash payments and includes any deferrals Gorman elected to make.

¶18 The next clause at issue in § 10 of the Contract states "Gadsden shall be entitled to the remaining cash paid (non-deferred) portion of the Development Fee, up to 40% of the total allowable Development Fee." Gadsden argues the trial court erred in interpreting "remaining" as limited to "whatever cash-payable funds that may be left over after Gorman receives in cash a total sum that equals sixty percent of the Development Fee." On the contrary, Gadsden argues "'remaining' . . . refers to sums that become available later in time" after Gorman has received the first sixty percent of the development fee. Gorman contends "[t]he word 'remaining' underscores the parties' understanding that Gorman would in fact *receive* its full share first." Gorman further maintains

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<sup>4</sup>Gorman also argues Gadsden conflates the \$598,034 "Deferred Development Fee" with "Additional Deferred Development Fee." While these terms are used in the Operating Agreement and not the Contract, § 10 of the Contract states that Gorman is entitled to the development fee as "payable under the Development Agreement." Schedule 1 of the Development Services Agreement, incorporated into the Operating Agreement, makes clear that \$598,034, the "Deferred Development Fee," is deferred for payment at a later date with "interest at 5% per annum" and sets a schedule for the remaining payments from the investor through West End Station to Gorman. The Operating Agreement also makes clear that Gorman could defer up to fifty percent of its anticipated development fee payments as the "Additional Deferred Development Fee." Nonetheless, Gorman's ability to defer is restrained by its agreement with Gadsden, as it is only entitled to sixty percent of the total development fee.

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that “remaining” is not a chronological term and that “the term contemplates the prior subtraction of some amount—here, ‘the first sixty percent (60%) of the total allowable Development Fee’—from some other amount—here, the ‘cash paid (non-deferred) portion of the Development Fee.’”

¶19 “Remaining” means “[t]o be left after the removal, loss, passage, or destruction of others.” The American Heritage Dictionary (5th ed. 2022 updated). While Gorman is correct that “remaining” denotes subtraction, it once again errs in substituting “receive” for “entitled” in its interpretation of the Contract. Once Gorman’s first sixty-percent share of the development fee has been subtracted from the total, via cash payments or deferment, Gadsden is entitled to the remainder. But because § 10 says the remainder must be “cash paid (non-deferred),” Gorman nevertheless argues this limits Gadsden to whatever non-deferred share of the development fee remains after Gorman has collected its sixty percent. Gorman also argues the language “up to 40%” signifies Gadsden may not receive the full amount and in fact “doesn’t guarantee Gadsden anything.”

¶20 Gadsden acknowledges the “cash-paid (non-deferred)” clause could either mean that its share is limited to the remaining non-deferred portion of the development fee or that “the Parties expected and understood that the remaining portion would be paid in cash because Gadsden bargained for cash payments.” However, Gadsden argues that “the first interpretation is impermissible because it would result in an illusory contract,” while the second interpretation clarifies Gadsden’s entitlement. Gadsden also contends that “up to 40%” simply memorialized that under the Operating Agreement, the investor could have adjusted Gorman’s development fee, which would have had the result of reducing Gadsden’s share.

¶21 Because “[a] clause in a contract, if taken by itself, often admits of two meanings,” courts consider the entire contract to determine the parties’ intent. *Climate Control, Inc. v. Hill*, 86 Ariz. 180, 188 (1959); see, e.g., *Terrell*, 248 Ariz. 47, ¶ 14 (“[W]e consider a provision’s meaning in the context of the entire contract.”); *Apollo Educ. Grp., Inc.*, 250 Ariz. 408, ¶ 11 (“We also interpret the terms in the broader context of the overall contract.”). As an initial matter, Gorman’s interpretation, which the trial court adopted, is problematic because it is contradicted by other language in § 10. Section 10 states Gorman is entitled “to the first sixty percent (60%) of the total allowable Development Fee.” If Gadsden is limited to “up to 40%” of the non-deferred development fee, as Gorman argues, then it is

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unclear which party is entitled to additional deferred portions of the development fee if Gorman has already received or deferred its first sixty percent of the development fee. “We will, if possible, interpret a contract in such a way as to reconcile and give meaning to all of its terms, if reconciliation can be accomplished by any reasonable interpretation.” *Gfeller v. Scottsdale Vista N. Townhomes Ass’n*, 193 Ariz. 52, ¶ 13 (App. 1998). We reject Gorman’s interpretation because it contradicts other language in § 10.

¶22 Our inquiry next turns to whether Gadsden’s interpretation is supported by the other relevant provisions of the Contract, specifically § 3 and § 12. In relevant part, § 3 of the Contract states, “Gadsden shall earn a share of the Developer Fee for its services to Gorman under the terms outlined in Section 10 of this agreement.” “Shall” means “[s]omething that will take place or exist in the future”; “[a]n order, promise, requirement, or obligation”; “[t]he will to do something or have something take place”; or “[s]omething that is inevitable.” The American Heritage Dictionary (5th ed. 2022 updated). “Earn” means “[t]o gain especially for the performance of service, labor, or work,” or “[t]o acquire or deserve as a result of effort or action.” The American Heritage Dictionary (5th ed. 2022 updated). This section makes clear that the parties intended for Gadsden to receive a share of the development fee for its services and conflicts with Gorman’s interpretation that allows Gorman to eliminate Gadsden’s share entirely through deferment.<sup>5</sup> Notably, Gorman has not claimed that Gadsden failed to perform under the Contract.

¶23 Section 12 of the Contract states, in relevant part, that “[a]ny existing agreements, either verbal or written, entered into by either Gorman or Gadsden with any other parties for any purpose prior to the execution of this agreement shall be the obligation of the executing party and not be the responsibility of the Project Owner or Managing Member of the Project.” Gadsden argues § 12 precludes Gorman from deferring Gadsden’s portion of the development fee because the deferments satisfied Gorman’s obligations to its investor to make development advances under the terms of the Operating Agreement that was signed two days before the Contract.

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<sup>5</sup>Gorman argues the trial court’s ruling did not “depend upon the definition of ‘earn’” or the text of § 3. We consider the definition of “earn” regardless because we review interpretations of contracts de novo, *Town of Florence*, 251 Ariz. 464, ¶ 20, and interpret contractual provisions in the context of the entire contract, *Terrell*, 248 Ariz. 47, ¶ 14.

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¶24 Gorman offers two arguments in response. First, Gorman argues § 12 is inapplicable to Gadsden because Gadsden is not the owner or managing member of the project. While it is true that Gadsden is neither, the Contract requires prior agreements to “be the obligation of the executing party,” and Gadsden was not a party to the Operating Agreement that dealt with development fee payments made by the investor to Gorman. Second, Gorman notes § 12 includes an exception for “agreements between Gorman and its consultants/sub-consultants related to the design and/or development of the Project” and argues the Operating Agreement was related to the design or development of the project. However, the Operating Agreement was not between Gorman and its consultants but rather between Gorman and its investor. Section 12 thus provides further support for the conclusion that § 10 does not allow Gorman to avoid Gadsden’s share of the development fee by deferring payments.

¶25 Although the Operating Agreement is a separate agreement between Gorman and the investor, it is referenced in § 10 of the Contract, which notes the total development fee is “payable under the Development Agreement.” The Operating Agreement incorporates by reference a Development Services Agreement between West End Station and Gorman. And that agreement, regarding the development fee owed to Gorman, states “the Investor Member’s Additional Capital Contributions may be adjusted in accordance with the provisions of the Operating Agreement, including without limitation Section 3.03, and that such adjustment may cause a revision of the Development Fee Payment Schedule.” This provision lends further support to the conclusion that the “up to 40%” language in § 10 of the Contract, which is otherwise clear and unambiguous, merely recognized that the timing and amount of the total allowable development fee may be changed. It does not support the conclusion that Gadsden could forfeit its entire forty-percent share of the development fee merely upon Gorman’s election to defer payments.

¶26 Even assuming Gorman’s interpretation of § 10 could be harmonized with the rest of the Contract, we would still reject it as it would render the Contract illusory. A contract that lacks mutuality because one party may withdraw at its pleasure is illusory and unenforceable. *Shattuck v. Precision-Toyota, Inc.*, 115 Ariz. 586, 588-89 (1977) (“To agree to do something and to reserve the right to cancel the agreement at will is no agreement at all.” (quoting *Eaton Factors Co. v. Bartlett*, 186 A.2d 166, 168 (Conn. Cir. Ct. 1962))). Under Gorman’s interpretation, it can avoid paying Gadsden up to forty percent of the development fee by simply deferring

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that entire portion.<sup>6</sup> Gorman nevertheless argues its discretion to defer Gadsden's portion does not render § 10 illusory as long as it was not exercised in bad faith, citing *Horizon Corp. v. Westcor, Inc.*, 142 Ariz. 129 (App. 1984).

¶27 In *Horizon Corp.*, we determined that a contract with a clause making the promisor's duty conditional on its satisfaction was not illusory, provided such discretion is exercised in good faith. *Id.* at 135. Here, unlike in *Horizon Corp.*, § 10 of the Contract does not have a satisfaction clause that controls when Gorman could defer Gadsden's portion of the development fee. Instead, under Gorman's interpretation, there is nothing in § 10 limiting or specifying how it could exercise its discretion to defer. See *Malcoff v. Coyier*, 14 Ariz. App. 524, 526 (1971) ("[I]t is essential to an enforceable contract . . . that its terms be sufficiently clear so that one can state with certainty the obligation involved."). Therefore, Gorman's interpretation would be unenforceable because it lacks mutuality.

¶28 Gorman further argues that § 10 does not require a "distinct pair of consideration that stands apart from other pairs" throughout the Contract by pointing to payments of \$95,000 and \$375,000 made to Gadsden under § 7 and § 11 of the Contract. In addition to the fact that these payments and their provisions are not the subject of Gadsden's breach of contract action, § 3 of the Contract makes clear that Gadsden "shall earn a share" of the development fee for its services to Gorman under § 10, and Gorman cannot retroactively change the terms of this bargain by suggesting the other payments actually provided the necessary consideration here if it deferred Gadsden's share.

¶29 During oral argument, Gorman maintained that Gadsden understood its entitlement to a portion of the development fee "was

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<sup>6</sup>Gorman disputes it had "total discretion" to defer, citing its president's deposition in which he stated a construction lender had forced Gorman to defer a portion of its development fee. However, Gorman's president also clarified that Gorman would not have been required to defer if it had obtained other funding or had cut other costs, and earlier, he stated Gorman's decision to defer was discretionary, although forced by "economic realities." Regardless, § 10 of the Contract does not expressly grant Gorman the right to withhold Gadsden's share of the development fee for economic reasons, and we enforce the express terms of contracts "regardless of the harshness or severity of the result." *Pinnacle Peak Devs. v. TRW Inv. Corp.*, 129 Ariz. 385, 388 (App. 1980).

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conditional as to whether there was any remaining and it was understood that that could be affected by market conditions and cost overruns.” However, neither the other terms of the Contract nor logic support this conclusion given that Gorman, contrary to its assertions, exercised total control over the project and was obligated to secure the necessary financing to complete it.

¶30 Accordingly, the trial court erred by interpreting § 10 of the Contract to require that Gorman receive the first sixty percent of the development fee in cash, which reduced Gadsden’s share of “up to 40%” to zero because it was limited to receiving cash payments. Instead, the plain language of § 10 and the context of the entire Contract make clear that once Gorman is entitled to the first sixty percent of the development fee, whether in payment or deferment, Gadsden is entitled to the remainder in cash, up to forty percent. Because the entire allowable development fee was made available to Gorman, actually received or deferred, and no portion of it was ever paid to Gadsden, the court erred as a matter of law in granting Gorman’s motion for summary judgment on the breach of contract claim.

*Breach of the Covenant of Good Faith and Fair Dealing Claim*

¶31 Gadsden further argues the trial court erred in granting summary judgment on its claim that Gorman had breached the covenant of good faith and fair dealing because it “produced sufficient facts establishing that Gorman acted to deprive Gadsden of the benefit of its bargain.” A covenant of good faith and fair dealing is implied in every contract. *Rawlings v. Apodaca*, 151 Ariz. 149, 153 (1986). That covenant is breached when a party denies another party’s “reasonably expected benefits” under the contract, *FL Receivables Trust 2002-A v. Ariz. Mills, L.L.C.*, 230 Ariz. 160, ¶ 41 (App. 2012) (quoting *Nolan v. Starlight Pines Homeowners Ass’n*, 216 Ariz. 482, ¶ 27 (App. 2007)), or exercises its discretion under the contract for reasons “beyond the risks assumed by the party claiming a breach,” *Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Loc. No. 395 Pension Tr. Fund*, 201 Ariz. 474, ¶ 66 (2002) (quoting *Sw. Sav. & Loan Ass’n v. SunAmp Sys., Inc.*, 172 Ariz. 553, 558-59 (App. 1992)). Breach of the covenant may occur “even in the absence of a breach of an express provision of the contract,” *Nolan*, 216 Ariz. 482, ¶ 27, and “is a question of fact for the jury,” *Cnty. of La Paz v. Yakima Compost Co.*, 224 Ariz. 590, ¶ 38 (App. 2010).

¶32 As an initial matter, Gorman failed to present any legal argument in its filings below to explain why it was entitled to summary judgment on Gadsden’s breach of covenant claim. *See United Bank of Ariz.*

*v. Allyn*, 167 Ariz. 191, 197 (App. 1990) (“If the [moving party’s] motion failed to make a prima facie case . . . then there was no basis for awarding summary judgment.”); *see also Nat’l Bank of Ariz. v. Thruston*, 218 Ariz. 112, ¶ 23 (App. 2008) (party moving for summary judgment “must do more than make bald assertions” and conclusory statements are insufficient). Then, during oral argument before the trial court, Gorman erroneously argued because “there is not a breach of the contract, there is no breach of the implied covenant of good faith and fair dealing.” *See Nolan*, 216 Ariz. 482, ¶ 27. Notably, the court gave no reason for granting summary judgment on Gadsden’s breach of covenant claim.

¶33 For the first time on appeal, Gorman argues the trial court’s grant of summary judgment was proper because the evidence demonstrated that Gadsden had accepted the risk that it may not be entitled to all or any of its share of the development fee. While generally “arguments not made at the trial court cannot be asserted on appeal,” we will consider them in the exercise of our discretion. *City of Tempe v. Fleming*, 168 Ariz. 454, 456 (App. 1991). In advancing this argument, Gorman points to the deposition testimony of Gadsden’s chairman, who stated, “if we had to be the 40 percent deferred person, we would consider doing that because we really wanted [Gorman] to develop this project.” Ultimately, this evidence merely suggests that Gadsden may have been amenable to having its portion of the development fee deferred, not that it assumed the risk of forfeiting its payment entirely by Gorman’s unilateral deferral.

¶34 As noted above, the Contract unambiguously entitled Gadsden to a share of the development fee and provided Gadsden would not be responsible for Gorman’s financial obligations to other parties. Gadsden receiving a share of the development fee was a reasonably expected benefit of the Contract, and Gorman’s deferment of Gadsden’s share was not a risk Gadsden reasonably assumed under the Contract. The court therefore erred in granting summary judgment for Gorman on Gadsden’s breach of covenant claim.

#### **Attorney Fees and Costs**

¶35 Both parties request attorney fees and costs on appeal pursuant to A.R.S. § 12-341.01(A) and Rule 21, Ariz. R. Civ. App. P. In our discretion, we deny both requests for attorney fees. As the successful party on appeal, Gadsden is entitled to its costs upon compliance with Rule 21.

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**Disposition**

¶36 For the reasons stated above, we vacate the trial court's judgment and remand for further proceedings consistent with this decision.